Dato' Tan Toh Hua & Ors v Tan Toh Hong & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–725 OF 1997

NH CHAN, ABU MANSOR AND AHMAD FAIRUZ JJCA

13 JANUARY 2001

Civil Procedure *— Injunction — Injunction to restrain application to oppose to winding-up petition — Whether petitioners need to give undertaking as to damages — Application to set aside injunction*

Companies and Corporation *— Winding up — Opposition to petition — Respondent a nominal party to winding up petition — Whether company's money should be expended on dispute between shareholders — Whether such expenditure a misfeasance*

The petitioners presented a petition to wind up the third respondent pursuant to s 218(1)(f) and (i) of the Companies Act 1965. The appellants who were the board of directors of the third respondent opposed the petition and had engaged solicitors to act for the third respondent in relation to the petition. The petitioners applied for an injunction against the appellants on the ground that the third respondent was largely a nominal party because the nature of the disputes giving rise to the petition and the appointment of the provisional liquidators were disputes which were purely between shareholders. Thus the use of the third respondent's funds by the appellant to defend the petition was a misuse of funds. The High Court judge granted the petitioners' application. The appellant appealed.

Held, dismissing the appeal:

(1) The High Court judge had exercised his discretion correctly when he granted the injunction prayed for. It has been held that it is a general principle of company law that the company's money should not be expended on disputes between shareholders. The court should prevent expenditure by directors of the company to resist to members' winding up petition based on the just and equitable ground. Such expenditure is a misfeasance (see pp 373E, I–374A); *Re A Company (No 004502 of 1988); ex p Johnson* (1992) BCLC 701 followed.

(2) It was not necessary for the petitioners to give an undertaking as to damages since the injustice that could be caused to the petitioners was great if the injunction was not allowed (see p 374D); *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 and *Pengkalen Securities Sdn Bhd v Leow Li Lain* 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2023 followed.

[Bahasa Malaysia summary

Pempetisyen telah mempetisyen untuk penggulungan responden ketiga menurut s 218(1)(f) dan (i) Akta Syarikat 1965. Perayu, lembaga pengarah responden ketiga, membangkang petisyen tersebut dan telah menggunakan khidmat penguamcara untuk mewakili responden ketiga. Pempetisyen memohon untuk injunksi terhadap perayu kerana responden ketiga merupakan parti nominal disebabkan oleh bentuk pertikaian yang menyebabkan petisyen tersebut, dan perlantikan penyelesai sementara merupakan pertikaian diantara pemegang saham sahaja. Oleh itu, penggunaan wang responden ketiga oleh perayu dalam membela petisyen tersebut merupakan penyalahgunaan wang. Permohonan pempetisyen dibenarkan oleh Hakim Mahkamah Tinggi. Perayu merayu.

Diputuskan, menolak rayuan tersebut:

(1) Hakim Mahkamah Tinggi telah menggunakan budi bicaranya dengan betul dalam membenarkan injunksi yang dipohon. Ia telah menjadi prinsip am bahawa wang sebuah syarikat tidak sepatutnya digunakan didalam pertikaian diantara pemegang saham. Mahkamah sepatutnya menghalang pembelanjaan oleh pengarah syarikat untuk menentang petisten penggulungan ahli berdasarkan alasan yang adil dan saksama. Pembelanjaan sedemikian merupakan misfeasans (lihat ms 373E, I–374A). *Re A Company (No 004502 of 1998); ex p Johnson* (1992) BCLC 701 diikut.

(2) Pempetisyen-pempetisyen tidak perlu memberi akujanji bagi gantirugi kerana ketidakadilan melampau mungkin disebabkan kepada pempetisyen-pempetisyen jikalau injunksi tersebut tidak dibenarkan (lihat ms 374D); *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 and *Pengkalen Securities Sdn Bhd v Leow Li Lain* 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2023 diikut.

Notes

For cases on injunction, to restrain winding up petition, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2028–2030.

For cases on winding up, opposition to petition, see 3 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 511–515.

Cases referred to

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (folld)

Company (No 004502 of 1988), Re A; ex p Johnson [1992] BCLC 701 (folld)

Pengkalen Securities Sdn Bhd v Leow Li Lain 2(1) Mallal's Digest (4th Ed, 1998 Reissue) para 2023 (folld)

Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1991] 3 MLJ 325 (refd)
Union Accident Insurance Co Ltd, Re [1972] 1 All ER 1105 (refd)

Legislation referred to

Companies Act 1965 s 218(1)(f), (i)
Courts of Judicature Act 1964 s 42(1)

Appeal from:

J Kannaperan (*Gurmeet Kaur* with her) (*Shearn Delamore & Co*) for the appellants.
Isabella de Silva (*HY Chong* with her) (*Azman Davidson & Co*) for the first and second respondents.
Logan Sabapathy (*Izral Khairi* with him) (*Logan Sabapathy & Co*) for the third respondent.

NH Chan JCA. : This is a judgment under s 42(1) of the Courts of Judicature Act 1964, as the chairman of this court had retired by the time this judgment was arrived at. Accordingly the term 'we' in this judgment refers to Dato' Abu Mansor JCA (now Federal Court Judge) and Dato' Ahmad Fairuz JCA (now Federal Court Judge).

This is an appeal against the decision of the High Court at Kuala Lumpur in granting injunctions against the appellants. The injunctions were applied for by the first and second respondents ('R1 and R2') by way of summons in chambers dated 4 September 1997 (encl 31).

On 22 July 1997, the R1 and R2 ('the petitioners') had presented a petition to wind up the third respondent ('R3'). On 7 August 1997, the petitoners obtained an order to appoint provisional liquidators. R3 is a party to the petition. It was contended that R3 is largely a nominal party because the nature of the disputes giving rise to the petition and the appointment of the provisional liquidators are disputes which are purely between shareholders. The board of directors of R3 however, is in control of the shareholders who opposed the petition, ie the appellants. It was alleged that the appellants, as directors of R3 had engaged the firm of Messrs Raja, Darryl & Loh to act as the solicitors for R3 in relation to the petition. R3 had in fact taken an active part in opposing the petition and the appointment of the provisional liquidators. This, according to the petitioners, would 'incur great expenses to' R3. Such expense would be 'entirely unnecessary' in light of the fact that the disputes are between shareholders (para 12 of the affidavit of R1 and R2 at p 179 of appeal record ('AR')). It was also alleged that several shareholders had moved for an order discharging the appointment of the provisional liquidators whilst R3 had also made a similar application. The end result, according to the petitioners would be a duplicity of applications at the expense of R3 (para 14 of the affidavit of R1 and R2 at p 179 AR). For these reasons, the petitioners feared that the funds and assets of R3 may be utilized to fund the opposition of the petition. Hence, the application for the injunctions against the appellants (para 15 of affidavit of R1 and R2 at p 180 AR).

The appellants deny that R3 is a nominal party. To them the views of R3 ought to be taken into account at the hearing of the petition. They contended that costs of R3's legal representation is not a ground for the issuance of injunctions.

Before us, counsel for the appellants argued that:

(a) a company's board of directors has residuary power to appoint solicitors to oppose the petition. On this issue, we were referred to the case of *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325, wherein the Supreme Court pointed out that the case of *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 held, inter alia, that 'notwithstanding the appointment of the provisional liquidator, and the general assumption by him of the company's powers, the board still retained certain residuary powers which included authority to instruct solicitors and counsel to oppose the petition and if a winding up order is made, to appeal against the order.' The Supreme Count then quoted the following passage from the judgment of Plowman J at p 1113:

> Clearly, for example, as I have already indicated, the power to instruct solicitors and counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it. If that is true in regard to the petition itself, it is, in my judgment, equally true of interlocutory proceedings which are such that it would not be appropriate for the provisional liquidator to give instructions on behalf of the company.

On the basis of these authorities, the learned counsel contended that with the injunctions, the residuary powers of the board would be restrained;

(b) the petitioner's allegation that the expenses incurred in getting representation for R3 is a misuse of corporate funds for the personal benefits of the appellants, cannot warrant the issuance of the injunctions. This, at best, urged the learned counsel, can only be a complaint sounding in damages. Thus, the appellants argued that the petitioners had failed to establish that there is a serious issue to be tried on the matter of the appellants having acted in breach of their fiduciary duty in having R3 represented;

(c) even if there is a serious issue to be tried, the balance of convenience would not be in favour of granting the injunctions as the provisional liquidator is already in control of the funds and assets of R3, and any dispositions of the third respondent's assets would be void after the presentation of the petition;

(d) the injunctions sought by the petitioners are interlocutory in nature. As such, an undertaking as to damages is mandatory, and the petitioners have not provided that undertaking.

The learned counsel for the petitoners submitted that:

(a) R3 is not a party to encl 31, which is directed to the appellants;

(b) the injunctions sought are not interlocutory. As such the undertaking as to damages is not required;

(c) residuary powers of the directors are limited to proceedings relating to R3 in the ordinary course of business and for the benefit of R3 as a whole;

(d) the use of R3's funds by the appellants is only permissible, according to art 79 of R3's articles of association, for the normal business of R3 and defending a petition presented in a shareholder's dispute is not a normal business of R3:

(e) improper expenditure means breach of fiduciary duties and misfeasance. It would therefore be wrong to permit representation of R3;

(f) the nature of the allegations in the petition are of wrongs by the appellants and not against R3.

In *Re A Company (No 004502 of 1988); ex p Johnson* [1992] BCLC 701, Harman J (at pp 702–703) said:

> The principle was drawn to the profession's attention by the decision of Hoffman J in *Re Crossmore Electrical & Civil Engineering Ltd* [1989] BCLC 137 at p 138 where he said:
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> > 'The company is a nominal party to the s 459 petition, but in substance the dispute is between the two shareholders. It is a general principle of company law that the company's money should not be expended on disputes between shareholders.'
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> That reminder of the classic view was based by Hoffmann J on *Pickering v Stephenson* (1872) LR 14 Eq 322, so nobody can suggest that it is a new development in the law.
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> It was exemplified as a proposition of law in the decision of Plowman J in *Re A, & B C Chewing Gum Ltd Topps Chewing Gum Inc v Coakley* [1975] 1 All ER 1017; [1975] 1 WLR 579, where a petition for the just and equitable winding up of the company A & B C Chewing Gum Ltd had been brought against the two directors and shareholders by the other shareholder, the company being a nominal respondent to that just and equitable petition as well. The petition succeeded and a winding-up order on the just and equitable ground was made, as appears from the report.

In the appeal now before us, the petition was presented pursuant to s 218(1)(f) and (i) of the Companies Act 1965 ('the Act'), and the petition under s 218(1)(i) of the Act is for a winding up on just and equitable grounds. Hence, we see no reason why the above quoted passage from Harman J's judgment cannot apply to the facts and circumstances in the appeal now before us. In the same case, Harman J at p 704 continued thus:

> The train of authority being well established, it seems to me quite clear that if it is shown that directors of a company have been causing the company's money to be spent on financing the resistance either to a 'pure' s 459 petition or, according to Plowman J in *Re A & B C Chewing Gum Ltd* and myself in *Re Hydrosan Ltd*, in financing the company's resistance to a member's winding up petition based on just and equitable grounds, the court should prevent such expenditure. Such expenditure is a misfeasance, there is no excuse for it

> in law and it is not a question of an arguable case being raised showing that it may be right to permit misfeasances. Misfeasances are not matters that are permitted by the courts and there is no question of an arguable case at all.

With this passage in mind, we are unable to say that the learned judge had exercised his discretion wrongly when he granted the injunctions prayed for.

As to the issue of the petitioners' failure to provide an undertaking as to damages, we agree with Edgar Joseph Jr J (as he then was) when in the case of *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90, he said:

> In any event, the court will not generally deny a plaintiff an interlocutory injunction to which he would otherwise be entitled simply on the ground that his cross undertaking in damages would be of limited or of no value. So, for example, in *Allen & Ors v Jambo Holdings Ltd* [1980] 2 All ER 502, the Court of Appeal held, when granting a Mareva injunction, that a cross undertaking was acceptable from the plaintiffs although he was legally aided. The rationale behind this was that questions of financial ability ought not to affect the position in regard to what is the essential justice of the case.

In fact the case of *Pengkalen Securities Sdn Bhd v Leow Li Lain* 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2023, held that it was not necessary for the plaintiff to give an undertaking as to damages since the injustice that could be caused to the plaintiff was very great if the injunction was not allowed. We would hold the same view in the light of the facts and circumstances existing in this appeal.

For the reasons stated, in particular in paras 7 and 8, we hereby dismiss the appeal with costs.

Appeal dismissed.

Reported by Jafisah Jaafar